QUI SU LAM & ORS v. SUPERINTENDENT OF LAND AND SURVEYS BETONG DIVISION

COURT OF APPEAL, PUTRAJAYA
ABANG ISKANDAR JCA
MARY LIM JCA
HARMINDAR SINGH DHALIWAL JCA
[CIVIL APPEAL NO: Q-01(A)-27-01-2017]
22 MARCH 2018

LAND LAW: *Acquisition of land – Award of compensation – Inadequacy of compensation – Compensation for building erected on land – Whether land use was specifically for agriculture – Whether building an illegal structure – Whether Sarawak Land Code prohibits erection of building on agricultural land – Whether use of building fell within ambit of s. 39A(1) and (2) of Sarawak Land Code – Whether appellants entitled to adequate compensation*

The appellants were the registered owners of a parcel of land situated at Ulu Semurin, Saratok. Pursuant to a notification under s. 48 of the Sarawak Land Code (Cap 81) ('Land Code'), published in the Sarawak Government *Gazette*, the Government took possession of a portion of the appellants' land. The appellants were awarded a total compensation of RM282,665.92, comprising RM254,562 for the value of the land acquired, RM5,043.60 for the crops on the subject land and RM23,060.32 for severance. The appellants accepted the award under protest. There was no award of compensation for a building that was erected on the acquired land, valued at RM288,000. The appellants referred their objections to the High Court for determination, claiming that the compensation awarded was inadequate in four respects: (i) value of the land; (ii) value of the crops on the land; (iii) severance; and (iv) the building on the land. The High Court Judge found that the appellants had proven their claim that the award was inadequate but only in relation to two of the four heads of claim: a sum of RM267,960, instead of RM254,562 for the value of the subject land and a sum of RM54,775, instead of RM23,060.32 for severance. The compensation for crops was maintained. The compensation for the building was refused on the ground that the building was an illegal structure as there was non-compliance of the Building Ordinance 1994 ('1994 Ordinance'). The appellants were said to have erected the building without first obtaining the requisite approvals of the local authority under ss. 3 and 8 of the 1994 Ordinance and thus, the building was an illegal structure for which compensation could not be made under s. 61 of the Land Code.

Held (allowing appeal)
Per Mary Lim JCA delivering the judgment of the court:

(1) The subject land fell outside the operation of the 1994 Ordinance. Although the land was alienated with express conditions that the land was intended for agriculture and specifically for the planting of paddy, the Land Code does not prohibit the erection of a building on agricultural land, even one with the express condition of planting padi or other particular crop. At the time of the resumption by the Government, the building and its use was within the ambit of s. 39A of the Land Code. Section 39A(1) allowed the erection of a building on the subject land, and the building may be used for one or more of the purposes specified in sub-s. (2). Therefore, the use to which the building in question was put fell well within the terms of s. 39A(1) and (2). (paras 17-19, 21 & 24)

(2) Section 1(1) anticipates that the operation of the 1994 Ordinance is both area and time specific, *ie*, the Ordinance may apply to different areas on different or same dates. Further, the subject land was neither 'town' nor 'suburban lands'. The subject land was 'country land', as confirmed in the two valuation reports prepared in relation to the hearing before the High Court; one of which was prepared by the respondent. Therefore, the 1994 Ordinance does not apply. The erection of the building was also not in contravention of the Land Code. It is an implied condition under s. 39A of the Land Code that the appellants were permitted to erect the building in question for the purposes explained by the appellants. The building erected on the subject land was consequently not an illegal structure. (paras 28, 31 & 33)

(3) As the building was not an illegal structure, under art. 13 of the Federal Constitution read with s. 60 of the Land Code, the appellants must be paid adequate compensation for the resumption by the Government. The two assessors' view that a fair and reasonable compensation for the building was RM288,000 stood unchallenged and the sum was awarded to the appellants as compensation for the building. (paras 34 & 35)

Bahasa Malaysia *Headnotes*

Perayu-perayu adalah pemilik berdaftar sebidang tanah yang terletak di Ulu Semurin, Saratok. Berikutan pemberitahuan bawah s. 48 Kanun Tanah Sarawak (Bab 81) ('Kanun Tanah'), yang diterbitkan dalam *Warta* Kerajaan Sarawak, Kerajaan mengambil milikan sebahagian tanah perayu-perayu. Perayu-perayu diawardkan pampasan berjumlah RM282,665.92, termasuk RM254,562 untuk nilai tanah yang diambil, RM5,043.60 untuk tanaman atas tanah tersebut dan RM23,060.32 untuk pemecahan. Perayu-perayu

menerima award itu dengan bantahan. Tiada award pampasan diberikan untuk bangunan yang didirikan atas tanah yang diambil, dinilai pada RM288,000. Perayu-perayu merujuk bantahan mereka kepada Mahkamah Tinggi untuk pemutusan, menuntut bahawa pampasan yang diawardkan tidak mencukupi dalam empat perkara: (i) nilai tanah; (ii) nilai tanaman atas tanah; (iii) pemecahan; dan (iv) bangunan atas tanah. Hakim Mahkamah Tinggi mendapati perayu-perayu telah membuktikan tuntutan mereka bahawa tersebut tidak mencukupi tetapi hanya berkaitan dengan dua daripada empat tajuk tuntutan; jumlah RM267,960 dan bukan RM254,562 untuk nilai tanah dan jumlah RM54,775 dan bukan RM23,060.32 untuk pemecahan. Pampasan untuk bangunan ditolak atas alasan bahawa bangunan tersebut adalah struktur haram kerana ketidakpatuhan Ordinan Bangunan 1994 ('Ordinan 1994'). Perayu-perayu dikatakan membina bangunan itu tanpa memperoleh kelulusan yang diperlukan daripada pihak berkuasa tempatan terlebih dahulu bawah ss. 3 dan 8 Ordinan 1994 dan oleh itu, bangunan tersebut adalah struktur haram di mana pampasan tidak boleh diberikan untuknya bawah s. 51 Kanun Tanah.

Diputuskan (membenarkan rayuan)
Oleh Mary Lim HMR menyampaikan penghakiman mahkamah:

(1) Tanah tersebut terangkum di luar operasi Ordinan 1994. Walaupun tanah itu dipindah milik dengan syarat-syarat langsung bahawa tanah itu diniatkan untuk pertanian dan khususnya untuk penanaman padi, Kanun Tanah tidak menghalang pembinaan bangunan atas tanah pertanian, walaupun dengan syarat langsung penanaman padi atau apa-apa tanaman khusus yang lain. Pada masa pengeluaran semula oleh Kerajaan, bangunan dan kegunaannya adalah dalam ruang lingkup s. 39A Kanun Tanah. Seksyen 39A(1) membenarkan pembinaan bangunan atas tanah itu dan bangunan tersebut boleh digunakan untuk satu atau lebih tujuan yang dinyatakan dalam sub-s. (2). Oleh itu, kegunaan bangunan yang dipersoalkan terangkum dalam terma s. 39A(1) dan (2).

(2) Seksyen 1(1) menjangka bahawa pelaksanaan Ordinan 1994 adalah kedua-duanya khusus dari segi tempat dan masa, iaitu, Ordinan tersebut boleh diguna pakai untuk kawasan berbeza atas tarikh yang berbeza atau sama. Selanjutnya, tanah tersebut bukan tanah 'bandar' atau 'pinggir bandar'. Tanah tersebut adalah 'tanah kampung', seperti yang disahkan dalam dua laporan penilaian yang disediakan berkaitan dengan perbicaraan di Mahkamah Tinggi; satu daripadanya disediakan oleh responden. Oleh itu, Ordinan 1994 tidak diguna pakai. Pembinaan bangunan tersebut juga tidak bertentangan dengan Kanun Tanah. Menjadi syarat tersirat bawah s. 39A Kanun Tanah bahawa perayu-perayu dibenarkan membina bangunan tersebut untuk tujuan yang dinyatakan perayu-perayu. Dengan itu, pembinaan bangunan atas tanah itu bukan struktur haram.

A **(3)** Oleh sebab bangunan tersebut bukan struktur haram, bawah per. 13 Perlembagaan Persekutuan dibaca bersama-sama dengan s. 60 Kanun Tanah, perayu-perayu mesti dibayar pampasan yang mencukupi untuk pengambilan oleh Kerajaan. Pendapat dua penilai tanah, bahawa pampasan yang adil dan munasabah untuk bangunan ialah RM288,000,
B tidak dicabar dan jumlah tersebut diawardkan kepada perayu-perayu sebagai pampasan untuk bangunan tersebut.

Case(s) referred to:
*Superintendent of Lands and Surveys, Sarawak v. Aik Hoe & Co Ltd [1966] 1 LNS 188 FC **(refd)***

C **Legislation referred to:**
Buildings Ordinance (Sarawak) (Cap 8), ss. 1(1), 2, 3, 8, 63(a), First Schedule, Second Schedule, Third Schedule
Federal Constitution, art. 13
Land Code (Sarawak) (Cap 81), ss. 39A(1), (2), 48, 56(1), 60, 61

D *For the appellants - Joshua Baru & Desmond Kho; M/s Kho & Partners*
For the respondents - Evy Liana Atang & Mohd Adzrul Adzlan; State Legal Officer, Kuching

[Editor's note: For the High Court judgment, please see Qui Su Lam & Ors v. Superintendent Of Lands And Surveys Betong Division [2016] 1 LNS 1576 (overruled).]

E *Reported by S Barathi*

JUDGMENT

Mary Lim JCA:

F **[1]** This is an appeal against a part of the decision of the High Court. The case concerns a claim for compensation following compulsory acquisition of the appellants' land. The appellants were not awarded compensation for a building that was erected on the acquired land because the building was considered an illegal structure under the Buildings Ordinance 1994 (Cap 8).

G **[2]** We agreed with the appellants' submissions that the learned judge had fallen in error in arriving at his decision that the building was an illegal structure. We found that this was factually erroneous and therefore unanimously allowed the appeal, set aside the relevant part of the order of the High Court and, ordered compensation to be paid for the building. These
H are our reasons in full.

Background Facts

[3] The facts are as appearing in the grounds of the learned judge.

[4] The appellants were the registered owners of a parcel of land described
I as Lot 49 Block 12 Awik Krian Land District situated at Ulu Semurin, Saratok.

[5] Pursuant to a notification under s. 48 of the Sarawak Land Code (Chapter 81), published in the *Sarawak Government Gazette* on 27 January 2011, the Government took possession of a portion of the appellants' land measuring 7,656 sq. m. for the purpose of building "Bangunan Pejabat RISDA, Bahagian Betong" ("subject land"). After the acquisition, the remaining portion of the land belonging to the appellants is now described as Lot 4194 Block 12 Awik Krian Land District.

[6] The Superintendent of Lands and Survey, Betong Division held an inquiry on 31 March 2011 to determine the compensation to be awarded to the appellants who were the objectors for the resumption or acquisition of the subject land. The appellants were paid total compensation amounting to RM282,665.92, comprising RM254,562 for the value of the land acquired, RM5,043.60 for the crops on the subject land and RM23,060.32 for severance.

[7] The Superintendent did not compensate the appellants for a building described as 'rumah burung walit' on the land acquired. By a letter dated 18 May 2011, the appellants accepted the award under protest. The appellants claimed that there was a building on the subject land which had commercial value of RM288,000. This value was not taken into account in the award and the appellants claimed for this amount.

[8] Pursuant to s. 56(1) of the Sarawak Land Code (Chapter 81), the appellants required the respondent to refer their objections to the High Court for determination.

[9] In the reference, the appellants claimed that the compensation awarded was inadequate in four respects: the value of the land, the value of the crops on the land, severance, and the building on the land.

[10] After hearing evidence from both parties, the learned judge found that the appellants had, on the principles established in *Superintendent of Lands and Surveys, Sarawak v. Aik Hoe & Co Ltd* [1966] 1 LNS 188; [1966] 1 MLJ 243, proved their claim that the award was inadequate. The learned judge proceeded to award higher compensation but only in relation to two of the four heads of claim: a sum of RM267,960 (instead of RM254,562) for the value of the subject land and a sum of RM54,775 (instead of RM23,060.32) for severance. The compensation for crops was maintained while the claim for compensation for the building was rejected.

[11] In rejecting the claim for compensation for the building, the learned judge accepted the evidence of DW1, a valuer called by the respondent. DW1 had testified that the appellants were not entitled to compensation for the building because it was a "rumah walit or rumah burung" which has no commercial value. DW1 also testified that the building was an illegal structure because the appellants did not have the requisite approval to construct the building.

[12] At paras. 22 to 29, the learned judge made the following findings:

> 22. Section 39A(1) of the Land code provides that whenever any land is alienated for agricultural purposes, the following implied conditions shall apply thereto: (a) that the land shall not at any time be used for any purpose other than agriculture; and (b) that no building shall be erected on the land other than a building or buildings to be used for one or more of the purposes for agriculture or one dwelling house for the proprietor of the land or for his domestic servants or agriculture tenant.
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> 23. The Land Code was enacted as an Ordinance to make better provision in the law relating to land whereas the Buildings Ordinance was to amend, consolidate and to make further provisions concerning the laws relating to building in the State, and for purposes connected therewith. Under s. 2 of the Land Code, 'agriculture purpose' includes the cultivation of any crop, market gardening, and the breeding and keeping of livestock and fish but does not include ornamental gardens or ornamental ponds and 'building' shall have the same meaning assigned to it in the Building Ordinance 1994. Under s. 2 of the Building Ordinance, 'building' is defined to include any house, hut, shed or roofed enclosure whether used for human habitation or otherwise.
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> 24. Section 1(1) of the Building Ordinance states that this Ordinance shall to the extent specified in the third column of the First Schedule come into operation in the areas specified in the first column of the Schedule. Under the First Schedule, this parcel of land came under the jurisdiction of the Saratok District Council and the date of its application was 1st November, 2000. Subsection 2 states that the provisions of this ordinance shall apply to any building other those specified under subsection (3).
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> 25. Subsection (3)(a) states that the Ordinance shall not apply to any building of the class referred to in the Second Schedule. Both the Objectors and Respondent did not submit that the building comes under subsection 3(b), (c), (d) or (e) or under Paragraph (2) or Paragraph (3) of the Second Schedule.
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> 26. Paragraph (1) of the Second Schedule states that except for by-law 120 and by-law 215(2), the provisions of Parts VI and VII of the Building Ordinance By-laws specified in the Fourth Schedule to this Ordinance shall not apply to private dwelling houses, detached or semi-detached and terrace houses intended for single family occupancies. Part VI of the Fourth Schedule sets out the regulations in respect of 'Fire Alarm, Fire Detection, Fire Extinguishment and Fire Fighting Access'. Under Paragraph (1), the provisions of Parts VI and VII do not apply to private dwelling houses except for by-law 120 and by-law 215(2).
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> 27. Reading the provisions of section 1 and the Second Schedule of the Building Ordinance, the provisions of the Ordinance and the regulations thereto apply to a building as defined in s. 2 of the Ordinance except the provisions set out in Parts VI and VII of the Fourth Schedule. The

building described as a 'rumah burung walit' comes within the definition of 'building' in s. 2 of the Building Ordinance. Therefore the Objectors were not exempt from complying with the provisions of the Building Ordinance.

28. Although the Objectors explained that they were unable to submit their application because they were informed that the government intended to acquire their land, they did not apply for exemption or from complying with the provisions of the Building Ordinance. Section 3(2) states that no person shall erect any building unless approval in respect of the site plan has been granted by the competent planning authority under section 8(4). Under s. 8(1) of the Ordinance, no person shall erect any building without prior written permission of the local authority and subsection (2)(a) says that any person who intends to erect any building shall submit to the local authority such plans and specification may be required by any by-law made under the Ordinance. They did not comply with these provisions.

29. Since they did not obtain approval or exemption from the planning authority or local authority for the building to be constructed on the land, it was an illegal structure on the land. The Objectors could not benefit from the illegality or from the illegal structure on the land. It was correct for the Respondent to reject the Objectors' claim for compensation for the building constructed on the land.

[13] In essence, compensation was refused on the ground that the building was an illegal structure as there was non-compliance of the Buildings Ordinance 1994 ("1994 Ordinance"). The appellants are said to have erected the building without first obtaining the requisite approvals of the local authority under ss. 3 and 8 of the 1994 Ordinance. That being so, the building is an illegal structure for which compensation cannot be made under s. 61 of the Land Code.

[14] From the learned judge's reasoning as set out above, it may be readily discerned that while His Lordship was prepared to accept that under s. 39A(1) of the Land Code, a "building" may be constructed on the subject land since it was land alienated for agricultural purposes, the appellants nevertheless had to have building approval under the 1994 Ordinance before erecting the building. Since there was no approval, or even exemption from the planning authority or the local authority for the building to be constructed on the subject land, the court found that it was an illegal structure for which no compensation could be paid.

[15] In order to come to that conclusion, the learned judge had to first find that the 1994 Ordinance applied to the subject land. And, in this respect, the learned judge said that "under the First Schedule, this parcel of land came under the jurisdiction of the Saratok District Council and the date of its

application was 1 November 2000. Subsection 2 states that the provisions of this Ordinance shall apply to any building other those specified under subs. (3)."

[16] It is the submission of learned counsel for the appellants that the learned judge erred in his findings. The appellants maintain that the subject land was not under the operation of the 1994 Ordinance. Consequently, the building may be constructed on the subject land without the approval of the local or planning authority.

[17] Having examined the evidence, we must agree with the appellants that the learned judge had clearly misdirected himself on the facts. Contrary to the understanding reached by the learned judge, indeed, the subject land fell outside the operation of the 1994 Ordinance.

[18] We note that the respondent had attempted to take issue with the fact that the subject land was land alienated with express conditions imposed; the express conditions being that the land was intended for agriculture and specifically for the planting of paddy. Learned counsel for the respondent submitted that since "the exclusive usage permitted under the special conditions of the land title" was for padi cultivation, a building used as a "rumah walit" or "rumah burung", by its very nature, will run afoul of that express or special condition.

[19] With respect, we find some difficulty in following that argument, especially since the respondent had not objected to payment of compensation for the crops that were planted on the subject land. In any event, when the relevant provisions of the Land Code are appreciated, it will be seen that the Land Code does not, without more, prohibit the erection of a building on agricultural land, even one with the express condition of planting padi or any other particular crop.

[20] This is apparent from the terms of s. 39A of the Land Code of Sarawak which reads as follows:

> Special Conditions implied on alienation for agricultural purposes
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> 39A (1) Whenever any land is alienated for agricultural purposes, the following implied conditions shall apply thereto:
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> (a) that the land shall not at any time be used for any purpose other than agriculture; and
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> (b) that no building shall be erected on the land other than a building or buildings to be used for one or more of the purposes specified or referred to in subsection (2).

(2) The purposes referred to in subsection (1)(b) are the following: A

(a) agriculture;

(b) (i) one dwelling house for the proprietor of the land or for his domestic servants or agriculture tenant;

(ii) such other buildings as may be necessary for accommodating any domestic servants of the proprietor or of his agricultural tenant, or persons employed on the land in connection with the use of the land for agricultural purposes; and B

(iii) such non-resident buildings as may reasonably be required by the proprietor or his agricultural tenant for purposes connected with land used by them for agricultural purposes as may be approved by the Superintendent: C

Provided that the land shall be used predominantly for agricultural purposes.

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[21] We do not see any violation of s. 39A as the subject land remained, at all times, as agricultural land. The appellants through the first appellant had testified that padi was cultivated on the subject land. It was however, developed into an orchard for the family. Fruit trees such as durians, dabai, mangga, manggis, langsat were planted. As mentioned earlier, the respondent agreed to compensate for these crops. E

[22] As for the building that was constructed, the appellants explained that the building was "to facilitate the daily administration of the orchard". This building described as a "farmhouse cum store" was "primarily used to store ... fertilizers and farm machinery including grass cutters, digging implements etc. It was also shelter for our visits to the farm." The appellants also had plans to use the first floor of the building for "swiftlet farming but were unable to submit our application to the appropriate authority for the relevant permits as soon after the building was completed we were informed that the Government had plans to acquire our land thereat for a RISDA building." F G

[23] In our view, that explanation and the evidence as seen from the valuation reports tendered, show that the building was erected within the terms of s. 39A. Further, and this appears to have been overlooked by the learned judge, the building had yet to be used for swiftlet farming. The appellants had planned for its future use, and that was as far as the first floor of the building was concerned. But, that was abandoned when the appellants were told of the intended resumption. H

[24] We are also of the view that, at the time of the resumption by the Government, the building and its use was within the ambit of s. 39A. Section 39A(1) allowed the erection of a building on the subject land, and the building may be used for one or more of the purposes specified in sub-s. (2). I

From the explanations of the appellants, we are of the view that the use to which the building in question was put fell well within the terms of s. 39A(1) and (2). As pointed out earlier, even the learned judge accepted this to be the case.

[25] Moving next to the matter of whether approval of the planning or local authority under the 1994 Ordinance was required. The learned judge was of the view that under s. 2 of the 1994 Ordinance, 'building' is defined to include any house, hut, shed or roofed enclosure whether used for human habitation or otherwise. The present building would come within the definition. As a starting proposition, that would be correct.

[26] However, we find the learned judge's reliance on the application of the 1994 Ordinance to be erroneous.

[27] Section 1(1) of the 1994 Ordinance states:

> 1(1) This Ordinance may be cited as the Buildings Ordinance 1994 and shall to the extent specified in the third column of the first Schedule come into operation in the areas specified in the first column of the said Schedule on the dates specified in the corresponding part of the second column of the said Schedule.

[28] Section 1(1) anticipates that the operation of the 1994 Ordinance is both area and time specific. In other words, the Ordinance may apply to different areas on different or same dates. In order to know the extent of the application or operation, one needs to check against the relevant columns in the First Schedule.

[29] Section 63(a) of the 1994 Ordinance further provides that the First, Second or Third Schedules may be amended by order made by the Yang Di Pertua Negeri. *Vide* the Buildings (Amendment of First and Third Schedules) Order 2001, published in the *Sarawak Government* Gazette Part II Vol LVI on 12 July 2001, the First Schedule to the 1994 Ordinance was amended "by substituting the words "urban areas" which appear under the heading "Extent of application in the third column of that Schedule and in respect of paras. (f), (g), (h), (i), (j), (k), with the words "town and suburban lands"."

[30] Up to 12 July 2001, it would be safe to say that the 1994 Ordinance applied to the "urban areas"; as identified in the First Schedule. The effect of the amendment in 2001 is that instead of applying only to "urban areas" with effect from 12 July 2001, the 1994 Ordinance now applies to the "town and suburban lands" specified in the First Schedule.

[31] However, the subject land is neither "town" nor "suburban lands". As seen in the title documents, the subject land is "country land". This is further confirmed in the two valuation reports prepared in relation to the hearing before the High Court; one of which was prepared by the respondent.

[32] Under the Sarawak Land Code (Chapter 81), "Country land" is defined as follows: A

> "Country land" means land other than land declared to be town, suburban or land comprised in a bazaar; whether before or after the 1st day of January 1958.

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[33] Since the subject land is country land, the 1994 Ordinance therefore does not apply. The erection of the building is also not in contravention of the Land Code. It is an implied condition under s. 39A of the Land Code that the appellant is permitted to erect the building in question for the purposes explained by the appellants. The building erected on the subject land is consequently not an illegal structure, contrary to what was found by the learned judge. C

[34] As the building is not an illegal structure, under art. 13 of the Federal Constitution read with s. 60 of the Land Code of Sarawak, the appellants must be paid adequate compensation for the resumption by the Government. Since the two assessors were of the like view that a fair and reasonable compensation for the building is RM288,000, and this stands unchallenged, we are of the view that this sum of RM288,000 must be awarded to the appellants as compensation for the building. D

[35] We had, therefore, unanimously, allowed the appeal with costs, set aside that part of the order of the learned judge dismissing the claim for the building and, ordered compensation of RM288,000 for the building. We had also ordered the deposit be refunded to the appellants. E

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